CHONG LOY SEN & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT, SINGAPORE
LP THEAN J
[MAGISTRATE'S APPEAL NO. 215 of 1984]
30 JUNE 1986

COPYRIGHT: *Section 3(1) of Copyright (Gramophone Records and Government Broadcasting) Act - Whether in possession of pirated copies - Meaning of "copyright subsisted" in s. 5(1)(a) - Meaning of "gramophone record" and "pirated copy" within the Act.*

The appellants were each convicted on 14 charges for being in possession for sale of pirated copies of gramophone records, an offence punishable under s. 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act ("the Act") and were each fined $300 on each of the charges and the tapes relating to the charges were ordered to be forfeited. This is an appeal from that sentence.

Held:

[1] The words "copyright subsisted" in s. 5(1)(a) of the Act mean that copyright subsisted in Singapore and although the words "in Singapore" are not present, it is implicit that the statutory provision refers to copyright in Singapore.

[2] The term "gramophone record" under the Act assumes a meaning other than its ordinary meaning - see *Heng Yik Fang v. Public Prosecutor* [1973] 1 MLJ 193. A recording of a song in a tape (which also contains a record of other songs) is a gramophone record within the meaning of the Act and if the gramophone record of that song was made or reproduced without the consent lawfully given by the owner of the copyright of the record of such a song, then it is a pirated copy within s. 2 of the Act.

[3] There was ample evidence on which the learned Magistrate based his finding that the copies of the cassette tapes referred to in the charges were pirated copies. On the totality of the evidence, the learned Magistrate was justified in his finding that the pirated copies were in the possession of the appellants for sale at the material time.

[Appeal dismissed. Convictions and sentences affirmed.]

Case also referred to :
Heng Yik Fang v. Public Prosecutor [1973] 1 MLJ 193
Kwah Hai Gong v. Public Prosecutor [1979] 1 MLJ 16

Legislation referred to:
Copyright (Gramaphone Records and Government Broadcasting) Act [Sing], ss. 2, 3(1), 5(1), (1)(a)
Criminal Procedure Code [Sing], s. 179(e)

For the appellants - Kan Ting Chiu
For the public prosecutor - O'Connor

JUDGMENT

LP Thean J:

The appellants were each convicted on 14 charges for being in possession for sale of pirated copies of gramophone records, an offence punishable under s. 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act Chapter 188 ("the Act") and were each fined $300 on each of the 14 charges and the tapes relating to the 14 charges were ordered to be forfeited. Each of the 14 charges against the 1st appellant, apart from the names of the song and the singer, is as follows:

Charge

You, Chong Loy Sen
Malaysian Identity Card No. 7936020

are charged that you, on or about 10 June 1981 at No. 6C, Golden Wall Flatted Factory, Jalan Rajah, Singapore 1232, did have in your possession for sale, jointly with Tan Siew Hong ten (10) pirated copies of a gramophone record "Tracy Huang - Love Me Tender" and you have thereby committed an offence punishable under s. 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act Chapter 188.

And each of the 14 charges against the 2nd appellant, apart from the names of the song and the singer, is as follows:

Charge

You, Tan Siew Hong
NRIC No. 0045861/I

are charged that you, on or about 10 June 1981 at No. 6C, Golden Wall Flatted Factory, Jalan Rajah, Singapore 1232, did have in your possession for sale, jointly with Chong Loy Sen ten (10) pirated copies of a gramophone record "Tracy Huang - Love me Tender" and you have thereby committed an offence punishable under s. 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act Chapter 188.

The appellants are partners of a business carried on under the name and style of Rainbow Sound Enterprise at 6-C Golden Wall Flatted Factory, Jalan Rajah, Singapore. According to the certified extract of the business registration, the general nature of the business is that of manufacturing cassette tapes and import and export of tapes, and the 2nd appellant is registered as the person responsible in the management of the business of the partnership.

On 10 June 1981, Inspector Jim Lee Ah Lai (PW2) led a party and raided the premises of the partnership at 6-C, Golden Wall Flatted Factory, Jalan Rajah. Included in the party were Detective Corporal David Lim, Detective Constable Sung Kok Ann, Detective Constable Toh Eng Yan, photographer Detective Corporal Zakariah, members of the Singapore Phonogram Association, and one P.T. Fernando, a private investigator (PW1). On arrival at the premises, they were informed by a male Chinese, Chong Swee Peng, that the 1st appellant, who was then not present there, was the person in charge of the factory. Chong was asked to get in touch with the 1st appellant, which he did. The 1st appellant subsequently arrived and identified himself as the person in charge of the factory. He was shown the search warrant and a search was then carried out at the premises and suspected pirated copies of cassette and cartridge tapes were seized. Thereafter, they searched a container which was parked outside the factory at a loading bay. The container was locked and the 1st appellant opened the container and various suspected pirated copies of cassette tapes were also seized. All

the copies of cassette and cartridge tapes seized were loaded onto a lorry and also to a police bus and were brought to the premises of EMI (Singapore) Pte. Ltd. at Jurong where they were transferred to two containers. The containers were later brought to a warehouse at Ruby industrial complex under the charge of commercial crime division's storekeeper, Sim Thye Seng (PW3).

Subsequently, representatives of respective recording companies went to ruby industrial complex with portable cassette players and cassette tapes which are true copies of the original records of songs. They listened to and compared the songs recorded in the true copies with those in the cassette tapes referred to in the charges. It was their evidence that the records of the songs contained in the cassette tapes seized and described in the charges were copies of the original recordings. The cassette tapes containing records of these songs were produced and admitted. The prosecution produced two affidavits (Exhibits P83 and P125) affirmed by Carol Phillips, a director of International Recording Copyright Limited, who deposed therein to the fact that on 10 June 1981, copyrights subsisted in Singapore in the respective gramophone records and the owners of the copyrights thereof were the persons respectively named in the affidavits and that the copies of the said gramophone records annexed to the affidavits were true copies of the records respectively; she made these affidavits on behalf of the owners of the copyrights in the said gramophone records. These two affidavits were admitted by the learned Magistrate under s. 5(1) of the Act. Evidence was also adduced before the learned Magistrate to prove that the cassette tapes containing records of the songs described in the charges were not manufactured by or with the consent of the owners of the copyrights of the records or their licensees. At the close of the prosecution, the learned Magistrate found that a case against the appellants had been made out which, if unrebutted, would warrant their convictions; he therefore called upon the appellants to enter their defence. Both of them however elected to remain silent and no evidence was adduced on their behalf. The learned Magistrate convicted them on the 14 charges and fined each of them $300 for each of the 14 charges. Against these convictions, this appeal is now brought.

Mr. Kan on behalf of the appellants attacked the convictions on various grounds. His first submission is that the affidavits (P83 and P125) were not in compliance with s. 5(1) of the Act and were wrongly admitted. It is convenient at this stage to set out s. 5(1) of the Act which is as follows:

> 5. (1) An affidavit made before a notary public by or on behalf of the owner of the copyright in any gramophone record and stating:
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> (a) that at the time specified therein, copyright subsisted in such record;
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> (b) that he or the person named therein is the owner of the copyright; and
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> (c) that a copy of the record annexed thereto is a true copy thereof,
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> shall be admitted in evidence in any proceedings under this Act on its production by the prosecution without further proof.

The objectionable part of each of the affidavits, according to Mr. Kan, is para. 2 thereof which (so far as relevant) is as follows:

> On the 10th June, 1981, copyright subsisted in Singapore in the following gramophone records and the owners of the copyright are as set out below:
>
> ...

Mr. Kan's complaint is centred on the two words, "in Singapore". He submitted that the inclusion of the words "in Singapore" in para. 2 of the affidavit was not provided for under s. 5(1)(a) of the Act and that rendered the affidavit defective and inadmissible. He relied on two decisions of the High Court, both unreported, namely, *Aw Theng Fung v. P.T. Fernando* (Magistrate's Appeal No. 39 of 1982) and *Lam Radio & Record Limited v. P.T. Fernando* (Magistrate's Appeal 119 of 1981). Miss O'Connor for the prosecution disputed that that was decided by the High Court in the two appeals; on the contrary she said that the appeal in *Aw Theng Fung v. P.T. Fernando* was disposed of on the ground that the affidavit should have stated the additional words "in Singapore" which it did not and that the appeal in *Lam Radio & Record Pte. Ltd. v. P.T. Fernando*, though succeeded, was not allowed on the ground that the words "in Singapore" were present in the affidavit in question. I have perused the records of these two appeals and there is nothing therein which really substantiates Mr. Kan's argument and I am inclined to accept what Miss O'Connor said. In my view, the words: "copyright subsisted", in s. 5(1)(a) of the Act obviously mean copyright subsisted in Singapore, as that is the copyright contemplated and recognised by the law of Singapore. Though the words, "in Singapore", are not present, it is implicit that that statutory provision refers to copyright in Singapore. As Miss O'Connor submitted, copyright does not exist in vacuo; it must be linked to a country territorially. However, when it comes to a question of determining whether copyright in relation to a gramophone record subsists in Singapore, it seems to me essential to show as a matter of evidence that copyright subsists in Singapore in that record. Consequently, if an affidavit in accordance with s. 5(1) of the Act is used it is essential to state therein that at a particular date copyright in relation to the record in question subsisted in Singapore and the words "in Singapore" are in my view necessary.

Mr. Kan also argued that the learned Magistrate wrongly accepted the two affidavits, P83 and P125, without allowing the appellants an opportunity to cross-examine the deponent on the affidavits and he relied on s. 179(e) of the Criminal Procedure Code, under which in a trial before a Magistrate's Court or a District Court, an accused shall be allowed to cross-examine all the witnesses for the prosecution. The two affidavits were admitted by the learned Magistrate under s. 5(1) of the Act, and under s. 5(2) they constitute *prima facie* evidence of the matters stated therein respectively and until the contrary is proved, the Court shall presume that the affidavits were made by or on behalf of the owners of the copyright in the records stated therein. If Mr. Kan wished, at that time, to cross-examine the deponent on her affidavits, he should have applied to the learned Magistrate for leave to do so. That he did not do. According to the record, no application appeared to have been made by him to the learned Magistrate for leave to cross-examine the deponent on the two affidavits; nor did the learned Magistrate indicate in any way his refusal to any application, if made, for leave to cross-examine the deponent. Mr. Kan merely argued that the affidavits were defective and inadmissible in that they contained the additional words "in Singapore", and was content to let the matter rest after the affidavits were admitted. In the circumstances, it is hardly open to him to complain that no opportunity had been given to him to cross-examine the deponent.

In each of the charges brought against each appellant, the prosecution treated a record of each song in a cassette tape, i.e., a sound track of a song in the tape, as a gramophone record within the meaning of s. 2 of the Act. In other words, each of the charges brought by the prosecution relates only to a recording of one song out of a collection of songs as recorded in a tape and there was no evidence at all as to the remaining songs. This obviously was intended to overcome the difficulty encountered in *Kwah Hai Gong v. Public Prosecutor*

[1979] 1 MLJ 16 where the High Court held that in order to succeed, it was essential for the prosecution to prove, *inter alia*, that the cassette tape, alleged to be a pirated copy, is an exact copy or reproduction of the gramophone record in which copyright subsists. Mr. Kan submitted that this course adopted by the prosecution was untenable and that a sound track of a song in a tape was not a gramophone record. Such an argument would probably be sustainable but for the meaning of the term, gramophone record, as defined in s. 2 of the Act. Under s. 2, unless the context otherwise requires, a gramophone record means "the material first embodying the recording of a sequence of sounds capable, by the use of that material, of being automatically reproduced aurally, but does not include a sound track associated with a cinematograph film". Clearly the term, "gramophone record", under the Act assumes a meaning wider than its ordinary meaning. Thus, in the case of *Heng Yik Fang v. Public Prosecutor* [1973] 1 MLJ 193, the High Court held that cartridge and cassette tapes are gramophone records within the meaning of the Act. The learned Chief Justice said, at p. 194:

> In my opinion the definition must be read in the context of the Act as a whole. The Act is an enactment dealing specifically with one subject matter, namely, the provision of penalties for infringement of copyrights in gramophone records and to permit Government to broadcast by radio or television musical works or gramophone records without infringing any copyright. The Act creates one offence only, namely, by providing that any person "who makes, reproduces, imports for sale, sells, exposes or offers for sale, or has in his possession for sale, any pirated copies of any gramophone record, shall be guilty of an offence" and provides the penalty for such offence. The Act does not leave the expression "gramophone record" to be construed in its ordinary dictionary meaning but gives it a much wider meaning by defining it in s. 2.
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> Accordingly, in my judgment the cartridge and cassette tapes found in the possession of the appellant come within the definition of "pirated copies" in the Act.

It seems to me that the statutory definition of a "gramophone record" contemplates a sound track, other than a sound track associated with a cinematograph film, as a gramophone record. A sound track of a song in a tape, which is a recording of a song, is a recording of sequence of sounds capable by the use of the tape of being automatically reproduced aurally. The fact that the tape contains a recording of other songs is immaterial; it is irrelevant to the question whether the sound track itself falls within the statutory definition. In my view, a recording of a song in a tape (which also contains a record of other songs) is a gramophone record within the meaning of the Act, and if the gramophone record of that song was made or reproduced without the consent lawfully given by the owner of the copyright of the record of such song, then it is a pirated copy within the meaning of s. 2 of the Act.

It was further argued by Mr. Kan that the prosecution had failed to prove that the copies of the cassette tapes referred to in the charges were pirated copies, i.e., copies made or reproduced without the consent lawfully given by the owners of the copyright in the records of which these copies were made or reproduced. It was said that all that was proved before the learned Magistrate was that the labels and inlay cards attached or affixed to the cassette tapes were not those of the owners of the copyright in question; but it was not proved that that cassette tapes were not tapes of the owners. I find no merit in this argument. There was ample evidence on which the learned Magistrate based his finding that the copies of the cassette tapes referred to in the charges were pirated copies. At any rate, the point in issue is not whether the tapes are not the tapes of the owner of the copyright in the record, but whether the records of the songs in the tapes are pirated copies, i.e., copies made or reproduced without the consent of the owner of the copyright in the record.

Lastly, it was argued that the learned Magistrate erred in his finding that the seized tapes were in the possession of the appellants. It was not dispute that at the material time the appellants were partners of the business carried on at 6C, Golden Wall Flatted Factory, Jalan Rajah and the 2nd appellant was the person responsible for the management of the partnership business. The pirated copies were found either in the business premises or in the container parked just outside the premises at a loading bay. When the police raided the business premises the 1st appellant identified himself as the person in charge at the premises and he had the key to the container and he opened the container. He told PW2 that the tapes which were then being seized were for export. In my view, on the totality of the evidence the learned Magistrate was justified in his finding that the pirated copies were in the possession of the appellants for sale at the material time.

In the result, I dismiss the appeal of the appellants and affirm the convictions and sentences.

Also found at [1986] 2 CLJ 482